THE JUDICIAL RECALL—A FALLACY REPUGNANT TO CONSTITUTIONAL GOVERNMENT

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Fallacious Methods of Advocacy

The other evening, on a city street corner, I was attracted by a hue and cry and by discordant notes emanating from a badly played violin in the hands of an up-to-date street fakir around whom, drawn by the smoky glare reflected by an improvised torch and by the din of voice and fiddle, were gathering the passersby to listen to the "lecture," guaranteed free to everybody and to be followed by a most extraordinary "offer" for the benefit of all mankind. In high sounding phrases, smacking of all the medical learning from Æsculapius down to date, but with quotations from standard authorities garbled and distorted into perverted meanings, and with now and then a homely but subtle and insidious *ad hominem* appeal, the fakir detailed most of the physical ills with which the human body is afflicted and alleged symptoms of this and that disease; and, having scared his hearers into a receptive mood, he launched forth with, as it seemed to their excited minds, bursts of eloquent and impassioned oratory. He represented the average human being as an object of piteous decrepitude or as the hopeless subject of degenerating tissues and death dealing germs. His entire argument was a mass of unscientific exaggeration of known evils and of worse ones purely imaginary. He inveighed against all the medical learning of the day and against the expert knowledge and experience of those recognized as authority in the science of hygiene, medicine and surgery. All learning and experience as shown from history were nothing. The wisdom of the fathers was merely tradition founded in error. What they had wrought out and handed down, the greatest discoveries and developments of the science of safeguarding human life and health which had brought the human race to the highest standard of scientific warfare with disease, were mere mockeries to the real truth. All of which,

and more, was easily proved by the fact that the present systems of treatment were unavailing to eradicate disease, that men still continued to die and to suffer from ills which brought, and at all times threatened, incapacity and death. Having thus demonstrated his major premise, and at the same time all the other assumed elements of his syllogism, he reaches down and brings forth a little sealed box marked "The People's Own Cure—a Progressive Remedy;" and asserts his assumed conclusion that this remedy, by its virtues, as demonstrated by its label, is the final and only true solution of the problems of human illness. Incredulous as I had been, I seemed to become changed from merely a curious listener to a submissive patient. Temporarily, through a sort of mental indolence, the high-sounding, oft-repeated periods of the phrase maker had seemed almost to benumb my reason and to send me hopelessly groping after new means of self-protection, for which I was accustomed, in my saner moments, to rely upon a fund of knowledge slowly accumulated by careful study and experience. Healthy as I supposed I was beyond the average man of my age, I felt, for the first time, unusual dimness of vision, a weakness in my back, defects in my breathing, a numbness in my feet and limbs and a new sensation of heart palpitation. How had that fool of a life insurance medical examiner recently passed me as sound? I had now a chance at least to make good; and it was only shortly before I came to myself that I, too, was reaching into my pocket to join the crowd in buying and partaking of this alluring "cure-all," thus suddenly and adroitly flashed upon them, without analysis and without any assurance of its nature or effects, except as conveyed by its seductive label.

Not for the purpose merely of indulging in a figure of speech, not merely to reduce an answering argument to terms of ridicule, much less to exploit my sense of humor—on the contrary, as a carefully deliberated illustration of the methods commonly employed in advocating the measures of the Judicial Recall—I offer this example of the up-to-date nostrum vendor. Like the advocates of those measures, he defies the experience of all history, he carps at all established institutions, pictures all progress as a delusion of stilted ignorance and brands as "reactionary" all those who hesitate or refuse to attach themselves to his newly discovered panacea, brought now for the first time in modern history to public attention under the enticing title of a "progressive" remedy. No real diagnosis, no scientific study

or consideration of the nature of the functions of the system to which it is to be applied, no scientific study of remedial agencies, no test or examination of the medicine, whether it be a compound or a single element, no deliberate consideration of the necessary or possible effects of its application—only a cry of pain and a jump in the dark—these are the characteristics of the methods employed by exhorters for the Judicial Recall in presenting their vicious but seductive fallacy, a fallacy which is repugnant to constitutional government.

An examination of the considerations which have been urged for the Judicial Recall, whether it be the Recall of Judges or of Judicial Decisions, and whether made by an ex-President or by United States senators, arrogating to their peculiar views the exclusive right to the title of "progressive," shows, without exception, the adoption of the street vendor's methods. They all dwell upon and exaggerate the existence of error, injustice, imperfections in the administration of justice or in the personnel of the judiciary, breathe distrust for existing conditions and disrespect for present institutions and incite discontent among all the restless elements of the unthinking and the untaught; and thereby confront large masses of the people with their first lessons in constitutional government, administered in the form of demagogic tirades poured forth not only against our federal and state constitutions but against any form of constitutional government. At the very time of the greatest sensitiveness of public feeling, at a period most critical, because of the unsettled condition of public opinion on great political, economic and social questions, these pretending teachers of the multitude, who, as citizens and as office holders in various capacities, have sworn to support the government of the United States and its constitution, are insidiously filching from the minds of those taught in the principles of constitutional government and traducing to those yet untaught, the fundamental and vital principles and axioms which are the very basis of our republican form of government. They distort precedent, misquote authority and misrepresent the purposes for which our government was framed. They replace justifiable feelings of contentment and prosperity with discontent and conviction of prevalent social and industrial injustice. They even extend their exaggeration of unnecessary evils to the highest fountain of justice that has ever existed under any human form of government, to that court which, under our constitution, stands as the final protection against injustice, as to which court the

humblest citizen of the land may feel that, as stated by our former minister to England, Edward J. Phelps,

> If oppression and wrong should gain the ascendancy, and injustice stalk abroad in the land, and all else fail him; nevertheless his humblest roof, and all things that are sheltered beneath it, would find, somehow, someway, a final refuge and protection in the Supreme Court of the United States.

It is this court which Rufus Choate, in his speech before the Constitutional Convention in Massachusetts in 1853, presented to those who were crying for unrestrained and unlimited power of the people as the final bulwark of law and justice, guaranteed by our constitution to every citizen—a court, as he said,

> Appropriated to justice, to security, to reason, to restraint; where there is no respect of persons; where will is nothing and power is nothing and numbers are nothing, and all are equal and all secure before the law.

Without admitting the evils enumerated and assumed by the advocates of the Judicial Recall as a justification and final argument for their proposition, I would begin where they leave off. I would assume, for the purpose of argument, the existence of many of the evils which they relate. I would remind them that the best elements of the national and state bars are seriously and energetically working for practical reforms in legal procedure, in the manner of the selection of judges, and in the prevention of delays and against the miscarriage of justice, and this, too, by feasible and constitutional measures and by every constructive and really progressive method which can be devised; and that the fact that satisfactory remedies have not yet been attained, is not the fault of the bench or of the bar, whose leaders have for years been urging upon the people, through the legislatures, fully formulated and efficient remedial measures. The fault lies with the people themselves, whose direct representatives in the legislatures, national and state, refuse properly to consider and act upon proposed laws of authenticated and undeniable efficacy. The failure or absence of remedy in no degree constitutes a justification for the application of the drastic and suicidal measures involved in the Judicial Recall.

Contrary to the methods of the Recall advocate, let us bring ourselves back, first, to a consideration of the nature and functions of the system to which this untried specific has been prescribed. Then let us examine the real character of the proposed remedy itself.

By no other method can its desirability or its efficacy be determined. By no such method has it ever been presented by its advocates. It will appear that the proposition of the Judicial Recall, whether in the form of the Recall of Judges or of Judicial Decisions, is not one of remedy for existing evils, but is an attack upon constitutional government itself; for it strikes at the very keystone upon the stability of which depends our present form, or any form, of constitutional government.

THE NATURE AND FUNCTIONS OF OUR CONSTITUTIONAL GOVERNMENT

To discuss comprehensively the questions involved would be to repeat and enlarge upon great constitutional authorities who have presented, in general and in detail, the growth, nature and extent of constitutional functions including those of the judiciary. In brief outline, let us here recall some great demonstrated truths as we examine the fallacies of the advocates of the Judicial Recall in the assumptions which they make as to the nature and functions of our constitutional form of government.

The Fallacy of Disregarding Human Fallibility

The first and most inexcusable fallacy is the assumption that the existence of evils, political, economic or judicial, arising in connection with this or that department of government, is necessarily an indictment of the administration of the government, of the particular department in connection with which the evils are found to exist, or of the government itself. Such assumption disregards the ever present and irremediable element of human imperfection. It is not and never can be within the power of man, at any stage of civilization, to establish, maintain and administer any institution, governmental, sociological, industrial or otherwise, free or even substantially free from incidental oppression, injustice and inequality, or from sacrifice, to some degree, of natural and theoretical rights of person and of property. The crudest social compact involves, to a greater or less extent, sacrifice. The most perfect form of government must involve the same sort of sacrifice and, with its human element, also many evils, both those avoidable and those unavoidable, evils which in their concrete application instance injustice, inequality and even oppression. The merits of any particular form of government or

of its administration, therefore, are not decided by the fact of the existence or non-existence of this or that evil, nor from the presence or absence of this or that instance of injustice, inequality or oppression. The question is: In view of the experience of mankind as known by the history of governments, what form, and what provisions of fundamental law, will in the end most tend to diminish the classes or instances of evil? Under what system may the natural evolutionary processes of change, by the guidance of intelligent efforts for reform and progress, best and furthest work out in the direction of universal freedom, equality and justice?

The fathers of our constitution did not predict or expect a perfect government free from the results of human error in its administration. The constitution was established, not with the expectation of forming a "perfect" union, but a "more perfect" union, and to establish—not finally and without exceptional failure, but in general, so far as human foresight and experience could provide—justice, domestic tranquillity, means of common defence, the blessings of liberty to ourselves and posterity and to provide the best means for working out, with all the vicissitudes of success and failure, those blessings of liberty. Its object was to establish a government which should in the long run, all things considered, be most conducive to "promote the general welfare" of the people who should live under it.

That the accomplishment of these purposes is best assured by our constitution is taught by the science of government, by experience and by authority. Gladstone characterized our constitution as "The most wonderful work ever struck off at a given time by the brain and purpose of man." No change in the essential form of government, no fundamental constitutional change, can be justified on the plea of the existence of unremedied or even irremediable evils. As expressed in the words of Lincoln:

> Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?

Appeals to popular prejudice inducing unrest and discontent at existing evils, should be met with distrust. Clamors for the

"rights" of the people should be checked with a steadfast but more altruistic regard for the preservation of the constitution which was expressly established to safeguard those rights. There should be kept in mind the warning of Hamilton when he said:

> A dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the introduction to despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.

The Fallacy of Pure Democracy

The fundamental fallacy of the Judicial Recall is the assumption that the object of our form of government and the goal toward which its administration should work are the establishment and promotion of a government directly by the people, in which the will of the majority, as expressed at the polls, should at all times receive the nearest possible immediate response through the machinery of the different departments by which the powers of government are administered. The assumption is, not merely that ours was to be a government generally democratic in form and in essence, but that in fact it was intended to be one of pure democracy; and that any substantial check or restraint upon the responsiveness by governmental departments to the will of the people expressed through their majorities from time to time, are, when shown by experience to be real checks and hindrances, imperfections, the immediate or gradual elimination of which should be the chief object of any reform movement which is entitled to be denominated "progressive." It is the presentation of this fallacy, regarding the fundamental object of our system of government, to the individual voter, whom this fallacy places upon a pedestal, as the direct representative of the democratic idea of "sovereignty" and whose sovereign rights the same fallacy has assumed to have been usurped,—it is this fallacy which is the root of all the misinformation, misunderstanding, deceit and illusion which have given the Judicial Recall its seeming popularity. Its falsity, however, is demonstrated by even the most superficial consideration of the nature and character of our form of government, of the functions of its different departments, and of the objects and efficiency of our constitution.

Our government is a democracy, but it is a *constitutional* democracy; and the very object of the constitutional feature is to place in the way of the sovereign people those limitations, checks and balances which, while not preventing enforcement of the will of the sovereign people, should insure the wise and deliberate exercise only of wise and deliberate, and therefore properly restrained, sovereign authority. Its primary object was to prevent the immediate enforcement of the unrestrained, unchecked and unlimited will of the majority, whether expressed at the polls or otherwise. Sovereignty invested in a single person or in a few, passing, without consideration of other distinctions, by inheritance, checked only by promises of respect for individual rights,—promises wrested from the sovereignty by force of arms, as were those of our Bill of Rights from King John at Runnymede, rights, however, vouchsafed only by ties of tradition or by precedent,—constituted the tyranny of monarchy, the evils and abuses of which, fresh in the minds of our constitution makers, rendered it abhorrent to them.

But, learned in the history of nations and conscious of the fate of states subjected to the unrestrained will of the people, they saw another danger to be avoided, greater than that of the tyranny of monarchy. Our government must insure to its people not only the blessings of liberty, not only the natural right of dominance by the people as sovereign, but it must safeguard forever those blessings and rights by a form of government adapted to that purpose, and the stability of which should, as far as human intelligence could provide, be made certain against the self-destructive elements inevitably accompanied by an absence of proper checks, limitations and balances, upon even the sovereign power of the people. They were not satisfied to leave such checks and limitations to rest upon precedent and to be presented by analogy or implication from the recorded history of events. They must be expressed and recorded as the supreme law of the nation, paramount to the will of the sovereign power and to the will of its representative governmental departments. In their wisdom they saw in this express and written, fundamental and paramount law the only sure and safe protection against the dangers of the tyranny of democracy. Recognizing the fact that, with further industrial, economical and social development, the fundamental law thus established might not be sufficiently elastic for the necessary adaptation, they provided for amendment

by a method, slow but not cumbersome, as facile and speedy as could be consistent with deliberate and well considered action and therefore with the necessary safeguards against the results of caprice, temporary passion or prejudice. While exercising the greatest wisdom of their times, they bowed wisely and consistently to the wisdom of future generations, but only to a wisdom which reaches and acts upon sound judgment, as their judgments were then pronounced, after dispassionate contemplation, deliberation and discussion of facts, theory and precedent.

The government established *is* a government "by the people." It is the nearest to a government by majorities that can be established consistent with the necessary elements of stability and the safeguarding against tyranny, which safeguards can only be retained by the constitutional checks and limitations upon the exercise of the sovereign authority and of the powers of its representative departments in the government. Any measure which, like the Judicial Recall, ignores these safeguards or their necessity is subversive.

Daniel Webster said in 1848:

Whoever says, or speaks as if he thought, that anybody looks to any other source of political power in this country than the people must have a strong and wild imagination for he sees nothing but the creations of his own fancy. He stares at phantoms. Let all admit what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign for they are so, that is to say, the aggregate community, the collected will of the people, is sovereign.

Abraham Lincoln said:

A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinion and sentiment is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Quoting these words from Lincoln, Senator Elihu Root at the recent Chicago convention said:

That covenant (the Bill of Rights) between power and weakness is the chief basis of American prosperity, American progress, and American liberty. . .

We know that there is no safe course in the life of men or of nations except to establish and to follow declared principles of conduct. There is a divine principle of justice which men cannot make or unmake, which is above all governments, above all legislation, above all majorities. The limitations upon arbitrary power, and the prohibitions of the Bill of Rights which protect liberty and insure

justice, cannot be enforced except through the determinations of an independent and courageous judiciary. . . .

So the three departments, the executive, legislative and judicial, were established, each separate from and independent of the others. No changing whim of the people could, even in two years, change the entire legislative representation, for the senate could not be entirely changed except after six years. It vested in the legislative department certain specified powers and expressly prohibited the exercise of other powers by either the federal or the state governments, expressly reserving to the states respectively, or to the people, all powers not so expressly delegated to the United States nor prohibited to the states. In order to avoid the oppression of the tyranny of undeliberate or capricious actions by the sovereign people, it was directly and expressly provided in section 9, Article 1, against the suspending of the privilege of the writ of *habeas corpus* and the passing of bills of attainder or *ex post facto* laws, against the levying of disproportionate taxes and of duties upon articles exported between these states; prohibiting any state from enforcing any law impairing the obligation of contracts, and from levying any impost or duty. And, later by amendments, the same supreme law prohibited the congress from interfering with the establishment and free exercise of religion, with freedom of speech and of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of excessive bail, of excessive fines and cruel punishments; the prohibition of slavery or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any state from denying or abridging the

rights of citizens on account of race, color or previous condition of servitude.

Read and consider these limitations, take any one of them and, as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this republic and those who shall come after them, and at the same time concerning the very integrity of the government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded, —not until then can you be a consistent supporter of the Judicial Recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate and impartial judgment.

These are some of the limitations placed upon the legislative powers of the people in the federal constitution, as similar limitations have been placed in all state constitutions, for the very reason that the judgment and discretion of the people could not, at all times, and without restraint and limitations, be relied upon, especially in times of agitation and in times of political or economic crisis. The necessary safeguards could be insured only by these express limitations upon the power of the sovereign people to legislate, and upon the privilege of the people to have legislation enforced.

The functions, powers and duties of the executive department and of its members were set forth and limited by express provisions.

By the same constitution, as by similar provisions in all state constitutions, there was also established a third department of government, the judicial, with certain express original jurisdiction and with such appellate jurisdiction, both as to law and fact, as should be provided by the legislative department. And by the same instrument it was provided (Art. VI) that,

This constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

And finally, it was expressly provided (Art. VI) that,

The senators and representatives before mentioned, and the members of the several state legislatures and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution.

Such are the nature, purpose and effect of the provisions defining the functions of our constitutional government; and it is in respect to these and similar provisions that it differs upon the one hand from a monarchy and upon the other hand from a pure democracy. While it is a government by the people, it is a government of checks upon the unrestrained exercise of sovereign authority. Its making was the freest possible from any passion or prejudice. In the words of Jay:

Men who possessed the confidence of the people, and many of whom had become highly distinguished for their patriotism, virtue and wisdom in times which tried the minds and hearts of men, undertook the arduous task in the mild season of peace, with minds unoccupied with other subjects. They passed many months in cool, uninterrupted and daily consultation, and finally, without having been awed by power or influenced by any passions except for love of their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.

Their combined learning in the science of government has not been equaled by any body of men ever assembled for the same or similar purpose. As expressed by Hamilton:

If it had been found impossible to have devised models of a more perfect structure then the enlightened friends of liberty would have been obliged to have abandoned that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known or imperfectly known to the ancients. The distributions of powers into distinct departments, the introduction of legislative balances and checks, the institution of courts holding their offices during good behavior, the representation of the people in the legislatures, by deputies of their own election—these are wholly new discoveries, or have made their principal progress toward perfection in modern times. They are the means and power by which the excellencies of representative government may be retained, and its imperfections lessened or avoided. . . .

They heeded and applied the warnings of authority and of experience. The details of their structure varied from the ideal only in

so far as hard experience and wise precept showed to them the necessity of restraining safeguards in order to insure practicability and stability.

Aristotle, nearly four centuries before the Christian era, said:

One species of democracy is where the public offices are open to every citizen and the law is supreme. Another species of democracy is where the public offices are open to every citizen, but where the people and not the law is supreme. The latter state of things occurs when the government is administered by psephismata (by popular vote) and not according to laws, and it is produced by the influence of the demagogues. . . . But where the laws are not supreme, demagogues arise; for the people become as it were a compound monarch, each individual being only invested with power as a member of the sovereign body; and a people of this sort, as if they were a monarch, seek to exercise a monarchial power in order that they may not be governed by the law, and they assume the character of a despot; wherefore flatterers are in honor with them. A democracy of this sort is analogous to a tyranny (or despotism among monarchies). Thus the character of the government is the same in both, and both tyrannize over the superior classes, and psephismata are in the democracy what special ordinances are in the despotism. Moreover, the demagogue in the democracy corresponds to the flatterer (or courtier) of the despot; and each of these classes of persons is the most powerful under their respective governments. It is to be remarked that the demagogues are, by referring everything to the people, the cause of the government being administered by psephismata, and not according to laws, since their power is increased by an increase of the power of the people, whose opinions they command. The demagogues likewise attack the magistrates, and say that the people ought to decide and since the people willingly accept the decision, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution. In order that there should be a constitution, it is necessary that the government should be administered according to the laws, and that the magistrates and constituted authorities should decide in the individual cases respecting the application of them.

Burke, in his reflections on the French Revolution, said:

Until now we have seen no example of considerable democracies. The ancients were better acquainted with them. Not being wholly unread in the authors who have seen the most of these constitutions, and who best understood them, I cannot help concurring with their opinion that the absolute democracy, no more than the absolute monarchy, is to be reckoned among the legitimate forms of government.

Webster, in his speech on the Rhode Island government, said:

The people cannot act daily as the people. They must establish a government and invest it with as much of sovereign power as the case requires. . . .

The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable. They must be exercised by representatives of the people, and what distinguishes the American government as much as anything else from any government of ancient or modern times, is the marvelous felicity of the representative system. . . . The power is with the people, but they cannot exercise it in masses or per capita. They can only exercise it by their representatives. . . . It is one of the principles of the American system that the people limit their governments, national and state. It is another principle, equally true and certain and equally important, that the people often limit themselves. They set bounds to their own powers. They have chosen to secure the institutions which they established against the sudden impulse of mere majorities. All our institutions teem with instances of this. It was this great conservative principle in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. . . . It is one remarkable instance of the enactment and application of that great American principle that the constitution of government should be cautiously and prudently interfered with and that changes should not ordinarily be begun and carried through by bare majorities. . . . We are not to take the will of the people from public meetings, nor from public assemblies, by which the timid are terrified and the prudent are alarmed, and by which society is disturbed. These are not American modes of securing the will of the people, and never were.

Washington recognized the impracticability of a pure democracy and of the necessity in any form of government of restraint upon the exercise of the will of majorities. "It is on great occasions only," he said, "and after time has been given for counsel and deliberate reflection that the real voice of the people can be known." And the following are also his words:

Republicanism is not the phantom of a deluded imagination. On the contrary, laws under no form of government are better supported, liberty and property better secured, or happiness more effectually dispensed to mankind. . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment, in the way which the constitution designates. But let there be no change by usurpation; for, though this in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield. . . . Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular opposition to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the constitution, alterations, which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. . . . This government, this offspring of our choice,

uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of liberty. . . . The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists, till changed by the explicit and authentic act of the whole people, is sacredly obligatory upon all.

Madison said in the *Federalist:*

A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole. A communication and concert result from the form of government itself, and there is nothing to check the inducement to sacrifice the weaker party or any obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence. Their conditions have ever been found incompatible with personal security or the rights of property, and have in general been short in their lives as they have been violent in their deaths. Theoretical politicians who have patronized this species of government have erroneously supposed that by reducing mankind to a perfect equality in their political rights they would at the same time be perfectly equalized and assimilated in their possessions and opinions and their passions.

Lecky, in his " Democracy and Liberty," says:

One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities, and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state.

Mill, in his essay on "Government," says:

In this great discovery of modern times, the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found. If it cannot, we seem to be forced upon the extraordinary conclusion that popular government is impossible. . . . The community can act only when assembled, and when assembled it is incapable of acting. The community, however, can choose representatives.

Tucker, in his work on the Constitution, says:

Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in lawmaking. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people; let lawmaking be in the hands of their representatives; and make the representatives responsible

at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights and dismiss those who, upon trial, will not. . . . The government of the numerical majority is the mechanism of brute force.

The federal supreme court, speaking through Chief Justice Fuller, after quoting from Webster's argument in the Rhode Island case, said in the case of *In re Duncan*, 139 U. S. 449, 461:

By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

Senator Henry Cabot Lodge, in his recent address, "The Constitution and its Makers," says:

The destruction of an independent judiciary carries with it everything else, but it only illustrates sharply the general theory pursued by the makers of the constitution. They established a democracy, and they believed that a democracy would be successful; but they also believed that it could succeed solely through forms and methods which would not make it impossible for the people to carry on their own government. For this reason it was that they provided against hasty action, guarded against passion and excitement, gave ample room for the cooler second thought, and arranged that the popular will should be expressed through representative and deliberate assemblies and the laws administered and interpreted through independent courts. Those who would destroy their work talk continually about trusting the people and obeying the people's will. But this is not what they seek. The statement as they make it is utterly misleading. . . . The framers of the constitution made it in the name and for the benefit of the people of the United States; for the entire people, not for any fraction or class of the people. They did not make the constitution for the voters of the United States. They recognized that the popular will could only be expressed by those who voted and that the expression of the majority must in the end be final. But they restrained and made deliberate the action of the voters by the limitations placed upon the legislative, the executive, and the judicial branches, so that the rights of all the people might be guarded and protected against ill-considered action on the part of those who vote. Those who now seek to alter the fundamental principles of the constitution start with a confusion of terms and a false proposition.

These are some of the considerations by which is demonstrated the fallacy of pure democracy, or the fallacy of direct adjudication of constitutional questions by popular vote.

The Fallacy of Judicial Usurpation

Another distinct but in many respects correlated fallacy indulged in by the advocates of the Judicial Recall is in respect to the nature and propriety of the powers of the judiciary. Where the evident functions of the court are admitted, their exercise, even within constitutional limits, is criticised as unwarranted and arbitrary; and the very existence of such powers is made the object of denunciation. From such proceed an excoriation of the constitutionally established powers of the judiciary and a demand that, by the indirect method of the Recall of Judges or by the more direct method of the Recall of Judicial Decisions, the protective and safeguarding restraints and limitations upon the immediate and direct enforcement of the will of the majority be made ineffective. Ex-President Roosevelt in an editorial in the *Outlook* of March 9, 1912, denounced our system of restraint by express limitations and held up as exceptional and unnecessary the admitted power of the judiciary, in this country, to decide between the logical requirements of a written constitution and the seeming requirements of a statute passed ostensibly for the purpose of improving social or economic conditions. He said:

> I speak purely of the kind of decisions which only American courts are entitled to make, the kind of decision which no judge in our neighbor Canada, *in Australia*, in England, in Germany or in France has the right to make, or would for one moment be permitted to make,—I am speaking of the action of the court of a state when it declares that a law passed in the collective interests of the whole community is unconstitutional.

The less shrewd, the more ingenuous and frank advocate, the typical advocate, of the Judicial Recall carries his fallacy to the extent of an assumption and express statement that the courts, having originally been established as a useful, if not necessary, department of government, have actually usurped powers and functions in no wise originally intended for them; that they have arbitrarily and without constitutional warrant arrogated to themselves a sort of final despotism, inconsistent with all proper theories of our form of government, and have asserted by gradual usurpation a sort of sovereignty of their own at war with the real sovereignty of the people. It is by such usurption, it is claimed, that the courts now exercise, the power to declare invalid and unenforceable statutes found repugnant to constitutional provisions. It is asserted that these usurped powers should be taken away by other, and, as it is said, perhaps

similar, arbitrary methods defying all constitutional considerations; so that thus there may be recovered to the people themselves the powers which have been insidiously but wrongfully wrested from them. This fallacy persists, from the covert misleading attacks made upon our constitution through comparison with unconstitutional systems of monarchy or democracy, systems impossible for us, to the open, unqualified denunciation of our entire system of government and of its constitution, and the open charge, as the basis of the argument for the Judicial Recall, that the judiciary have stolen, by gradual, unconstitutional encroachment and usurption, the real sovereignty which was intended to rest at all times and under all circumstances directly with the people. Such is the vice of the insidious and misleading appeal to the voter, made by the self-seeker for notoriety or for office, who pretends to teach his hearers that government "by the people" means, not our form of government as administered under the constitution, but another and different system of government; or that it means our system, so far as mere matter of form is concerned, but administered in such a way that its essence shall be lost and only the mere form left, fragile and responsive, without limit and without delay, to the changing demands of the people, as expressed from time to time by their majority vote. Such is the vice of the cry that the constitution and the law must not be greater than their makers; that judges are merely the servants of the people; that the people made the fundamental law and that they make the statutes and that their last expressed will, as represented by a temporary majority, should be directly enforceable as a law paramount to all others.

Let us, who as citizens have sworn to support our constitution and our government and laws under that constitution, and who, respecting our oaths, insist that changes in government, or in the administration thereof, shall be brought about only through constitutional methods, consider for a moment the constitutional functions of the judiciary and the necessity of the preservation of these functions, and particularly of its independence.

The necessity of constitutional limitations as essential to the efficiency and stability of our form of government has been shown. But these limitations and restraints could not be enforced, except through a judicial department; and it was for that purpose primarily that the judicial department was established. It was upon the courts under our system of government that the only ultimate reliance

could be placed to safeguard and enforce the constitutional limitations expressly placed upon the sovereign power of the people. It was expressly made the duty of the federal and of the state courts to observe this fundamental law as the supreme law of the land; this is the duty which has been performed by the federal and state courts and it is by the performance of this function that our constitutional government has been preserved. This duty included the power of the courts to declare invalid any statute if repugnant to constitutional provisions. That this duty and power were originally imposed upon the courts as an essential feature of the new form of government and is in no degree a usurption or after-thought, is shown by the fact that the deliberations of the constitutional convention at all times assumed such power to be intended for the judiciary. That it was so understood by the several states in ratifying the constitution is shown by the fact that the existence of this very power in the judiciary was everywhere urged upon the states as the great safeguarding provision which, as against all the timorous feeling of uncertainty, should make them assured of the safety and efficiency of the new constitution and act as a compelling reason for its unanimous adoption. Ellsworth, on January 7, 1788, urging the ratification of the constitution upon the Connecticut convention, said:

> If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government, the law is void; and upright, independent judges will declare it so.

So at the same period Hamilton was urging in the *Federalist*:

> There is no liberty where the power of judging be not separate from the legislative and executive power . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the commands of the constitution void.

So Chief Justice Marshall, in the case of *Marbury* v. *Madison*, 1 Cranch, 368, 388, summarizes the constitutional provisions including those making it the supreme law of the land and binding upon all courts, federal and state, and requiring all judges to swear to its sup-

port and the requirement by the yet sovereign people, through their legislatures, of an oath by every judge that he "will faithfully and impartially discharge" all the duties incumbent upon him according to the best of his abilities and understanding, "agreeably to the constitution and laws of the United States;" and he demonstrates that the power and duty of the courts to declare invalid unconstitutional statutes are imposed not only by necessary implication but by express provision. He said:

> This original and supreme will [the people] organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, [either] that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

A Significant Example of Fallacious Statement

Ex-President Roosevelt cites Australia as a country where the powers of the courts, as exercised in the United States, find no parallel. As pointed out by Justice Burch of the Kansas supreme court in a recent address, it is the instance of Australia which shows a deliberate adoption of our constitutional methods and of the very powers of the judiciary which are now widely made the subject of denunciation. As late as January, 1901, upon the address of all the Australian colonies to the British crown, there was put into effect, for the government of the people of the entire Australian continent, a written constitution modeled upon that of the United States of America. For

five years representatives of the colonies had discussed with the greatest learning and research the merits and demerits of different forms of government as shown by the experience of parliamentary systems of government and of that of the United States and other countries, with the result that the American precedent became the guide and model of a new continental government. It followed closely, in many respects, the American model in its separations of federal and state authority, and in its division of power between the three separate and independent, legislative, executive and judicial departments, and, what is more important, with a federal judiciary as the supreme interpreter of the constitution and with the constitution as the supreme law of the land. And for ten years prior to the time when ex-President Roosevelt was claiming a repudiation by Australia and other nations of the world of the power of the judiciary to prevent enforcement of a legislative statute as repugnant to the supreme written law of the land, the courts of the commonwealth of Australia had, following the precedent of decisions of the supreme court of the United States, been declaring numerous statutes, even some affecting human rights from a vital standpoint, "*ultra vires*," that is, unconstitutional. Such decisions included those declaring invalid the federal act establishing a worker's mark, passed in the interests of union labor, as an invasion of the separate powers of a state over domestic commerce and industry; a federal act attempting to control disputes between employer and employee on state railways; and an excise tariff act by which it was attempted indirectly to secure to workmen a share of the profits accruing to employers from protection taxes.

Another incident which has been overlooked by the chief American advocate of the Recall of Judicial Decisions is that the measure of the appeal to the people from the decisions of the courts on constitutional questions was, over a decade ago, presented to the Australian constitutional convention, and although fully debated, received no substantial support except from the member proposing it and was finally withdrawn. It was unanimously agreed that this indirect method of amending or modifying the constitution was inconsistent with the form of government proposed, which gave ample opportunity for all proper amendment by methods requiring deliberate action.

This recent well-considered approval, by an exceptionally intelligent and progressive people of an entire continent, of our

constitutional system, now denounced to the American people by an American of world-wide reputation, is a most significant, though silent, answer to the advocates of the Judicial Recall fallacy.

THE PROPOSED REMEDY OF JUDICIAL RECALL ANALYZED

In less strenuous times, it would seem almost puerile to detail, even to the extent of the above statement, the nature and functions of our government and of its judicial department. The necessity of doing so now only illustrates the truth of the maxim that it is necessary now and then to get back to first principles. It is the first principles of government which are ignored by the advocates of the Judicial Recall. Our government is not one of pure democracy, but is a republican or *constitutional democracy*. It is a government not directly by majorities, whose changing whims shall be enforced directly and immediately from time to time as people may be affected by passion or prejudice. It is one where for self-protection, for the protection of each constituent member of its citizenship, there are self-imposed general rules of conduct, general limitations of powers upon the federal and upon the state legislatures. It is a government by a majority, but by a majority acting through representatives and at the same time restricted within express limits, limits which are unchangeable except through deliberate, well-considered action. These restrictions and limitations are the supreme law of the land and it is the express duty of the courts to enforce their observance. The primary function of the courts is to stand between temporary demands of a majority and the oppression and injustice which must, or at least may, follow unrestrained power. For the preservation of this safeguarding element, the independence of the judiciary is essential. It must not be cringing or subservient to a majority. Its judges must be the "servants" of the people only in the sense that, for the people, they carry out fearlessly, impartially and judicially the duties which are imposed upon them. Any measure which strikes at their independence strikes at the very foundation of the judicial department and at the very foundation of our government itself.

In order properly to perform these functions the element of independence is absolutely essential. Without the quality of absolute independence, the judicial department becomes a mere reflector of public opinion, constantly changing with the temporary whims, passions and prejudices of the majority.

It was the better to preserve the independence of the judiciary that the tenure of office during good behavior was advocated and adopted. Eighty-seven years before the adoption of our constitution, the King of England had the arbitrary power of unseating a judge; but that power was taken away by the Act of Settlement, which secured to the judges their tenure of office during good behavior, subject only to impeachment by parliament. In so much did the Act of Settlement make the government of England take on a feature, republican in form, for the power of removal of judges was given to the representatives of the people, not to the people themselves directly, but to the parliament which was given the duty to hear, try and determine, and which was a body so constituted that it could perform that function.

So, in advocating the constitution and the good behavior tenure, Hamilton said:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this all the reservation of particular rights or privileges would amount to nothing.
>
> This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion *dangerous innovations* in the government and serious oppressions of the *minor party* in the community.
>
> Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial officers in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

In order to avoid the danger of subserviency by reason of short-term elections, the Massachusetts constitution, as late as 1870, provided for tenure of office for judges during good behavior, subject to removal by impeachment. As stated in that constitution:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the

laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and *independent* as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices as long as they behave themselves well.

It necessarily follows that any measure of reform is obnoxious and unwise in so far as it is antagonistic to these basic principles of our form of government. Any measure which is directly repugnant to these principles is not only inexpedient, but absolutely indefensible. Such is the character of the Judicial Recall, whether proposed in the form of the Recall of Judges or of Judicial Decisions. The Judicial Recall is not remedial, but baneful in its nature. It is not either constructive or progressive, but is destructive and reactionary. This is true whether viewed from a mere theoretical statement of its elements or from the concrete instances of its attempted application. It means a replacement of a properly adjusted, stable, practicable, successful, constitutional government with a form of government shorn of constitutional protective features. It directs all the forces of reform into a downward path leading to further elimination of the very rudiments of our republican system. It would establish the precedent of the yielding up of fundamental principles to the temporary pressure of elements of unrest, instead of insisting upon a constructive adjustment consistently and scientifically worked out in such a way as to save to the American people these protective features of our form of government which distinguish it from despotism upon the one hand, and from disorder, socialism and anarchy upon the other.

The Recall of Judges

The Recall of Judges has, by the very terms in which it is usually expressed and presented, a certain allurement which blinds the superficial observer to its essential vices. Like the Recall of Judicial Decisions, it is founded on the fallacy of human infallibility, on the fallacy of a sort of divine right belonging to the people to have the sovereign authority, ultimately imposed in them, exercised directly upon the command of a majority, and, finally, upon the fallacy that the power exercised by the courts to invalidate unconstitutional statutes, because it operates as a check upon the direct exercise of the people's sovereignty, is, for that reason, an obstacle and a menace

and is a power attained by usurpation. From such origin has the Recall of Judges arisen and is now put forward as the remedy and solution of all the evils complained of. Its impracticability is demonstrated by theory and by experience.

As applied in Oregon and, with some modifications, in other states, the Recall of Judges means that a judge may sit secure for the first six months of his office, and that, if at any time thereafter, for any reason, or without reason, twenty-five per cent of the voters of his district file a petition demanding his recall, stating in such petition in any manner they choose the complaint which they have against him in not to exceed two hundred words, which limited charge shall be placed upon a ballot at an election upon short notice, then the judge, if he does not resign, must go to the polls with the privilege of having placed upon the same ballot his defense in not to exceed two hundred words, and must stand for election against other candidates selected by his opponents, and that, upon such manner of charge and defense, the voters of his district shall decide whether he shall be retained upon the bench or an opposing candidate be put in his place.

The mere statement of the provisions for the recall is sufficient to condemn such a measure not only as repugnant to the proper administration of justice, but as a serious injection into our system of government of a travesty upon justice.

A Summary, Arbitrary and Unrestrained Power

It is not necessary to defend other methods of removal of judges nor to discuss reform measures by which the method of removal by impeachment may be made more efficient. The removal by address of the legislature or by impeachment involves the constitutional elements of a notice to the accused, an opportunity for hearing, a hearing upon the facts and upon the law, and an adjudication in accordance with the fundamental constitutional principles protecting the rights of every person accused of an offence. The recall is not only devoid of all of these constitutional elements, but involves all the vices against which these fundamental protective features were intended. Even if the causes for recall were expressly confined to misfeasance and malfeasance, and even if specific charges should be required, how could it be possible for a proper or sufficient notice to be given to the accused in the limited space of two hundred words?

Suppose the charge be one of incorrectness in a decision involving questions of fact and law, how could a defence to such a charge be made in the same limited space? And, even if issues of fact and law were sufficiently framed, what guaranty is there that any of the adjudicators, that is the voters, who finally pass upon the issues, shall consider these or any issues? The result must be that the very bringing of an indictment by the filing of a recall petition shall be taken by a large number, and perhaps by a majority, as of itself sufficient proof that a change is desirable. There can be no hearing except by public clamor and upon statements, however false, which are spread broadcast by newspaper and by pamphlet and by rumor, without the slightest pretense of verification even by any form of oath. At the very best, it involves a "trial" upon mere hue and cry, and a decision upon complicated and important issues by the mere arbitrary dictum of a misinformed and prejudiced populace.

But, as to the Recall of Judges, we are not without experience; and the history of its attempted application further demonstrates its vice. It has been attempted to be justified by the claim that in Oregon, for instance, where it has been in force for four years, no abuse of the privilege has arisen and no judge has actually been recalled. But the strongest indictment against the recall comes from its advocates, or its apologists, who instance its application in Oregon and other states. One writer refers to the recall in that state as the "final crowning act to complete the temple of popular government here." He admits, however, that actual recall movements have in many cases been prevented because, under some court decisions and the opinion of an attorney-general, it is considered that additional legislation may be required to allow its operation. But the exceptional cases of its application are sufficient to demonstrate its vice. It is admitted that the recall petitions are circulated by personal, partisan opponents and, in the case of judges, by dissatisfied litigants, and that names are gathered by irresponsible circulators, whose only object is to receive the five cents a name reward for all names procured upon the recall petition.

Neither the petition nor the two hundred words upon the ballot pretend to disclose all the motives nor the chief motives for the recall demand. A municipal officer incurred the hostility of certain property owners, by opening, in accordance with his duty, certain streets which had been illegally closed. The charge against him was simply

that he was "inefficient," "immoral," "untruthful" and "arbitrary." A local war between two banks divided a city against itself and one opposing faction instituted a recall against a hostile city official, charging simply that he was "unsatisfactory" and had "illegally diverted public funds," etc. A city mayor adopted a progressive policy in regard to public improvements and the charge was in vague terms of "improper expenditure," "incompetency," etc. Again, a councilman had furthered an ordinance deemed by the labor unions prejudicial to their interests. He was recalled upon a petition stating simply that he did not "faithfully and efficiently represent" the interests of his ward. The candidate put up to oppose him won in the recall election. In another case where the real issue was the attitude of a councilman with reference to the prohibition law, the charges were of "unsatisfactory administration," "abuse of the emergency clause in the enactment of ordinances," etc., with no reference to the real object of the recall movement. Cases where the recall proceeded or was determined upon the charges stated in the petition and ballot, and where the real basis of the movement was not merely personal or factional spite, are rare occasions. It is admitted that threats of recall are commonly used to bring into line with factional demands the action of administrative as well as of judicial officers.

While no actual recall of a judge has been obtained in Oregon, attempts at judicial recall have been made; and undoubtedly other and successful attempts would have been made had it not been for the supposed necessity for further legislative action in order to make it effective. An incompleted attempt at recall was made against a circuit judge because he sustained as legal the provisions of a city charter allowing the sale of intoxicants. The crucial instance of the application of the judicial recall in Oregon is that instituted against Circuit Judge Coke, who, upon the trial of one McClellan for the murder of a well-known citizen of Roseburg, instructed the jury that if they found certain facts, of which there was evidence favoring the defense, such facts would sustain the claim of self-defense and therefore of justifiable homicide. The instructions of the judge were exactly, in terms and in principle, in accordance with the law expressly stated by the Supreme Court of Oregon in another somewhat similar case. Their correctness is scarcely debatable from a lawyer's standpoint. The jury found the facts as claimed by the defense, and, following the instructions of the court, acquitted McClellan. Local

passion and prejudice against the defendant had been excited to the point of demanding conviction and were turned against the judge whose fairness and judicial qualities had never before been questioned. A recall petition was instituted and objection was made to the nature of the two hundred word charge as not being sufficiently specific to allow proper answer. The attorney-general held that under the law the charge need not be specific and that it might, as in that case, consist of merely a series of epithets applied to the judge complained of, as "incompetent," "unfair" and the like.

It is admitted by candid advocates that these abuses of the recall are inevitable and irremediable and that it is never possible to determine whether an official has been thereby deposed upon grounds asserted in the recall petition or others really the basis of the demand for the recall; for at election he must satisfactorily justify his entire official conduct and compete with the political ambition of other candidates precommitted upon any of the judicial questions at issue, and he must, at the same time, face personal opposition at a time when it has been brought to its most virulent pitch against him and in the midst of greatest feeling of discontent, passion or prejudice induced by ignorance, calumny and wilful machinations. It is admitted also that, as against possible influence in some cases of a salutary nature, there are many palpable instances where the very possibility of a recall has caused obvious "sins of omission" on the part of officials who refrain from enforcing the law, as they would otherwise than for the fear of a recall. Former advocates of the recall now admit that the representative and important factors of the recall, and particularly of the Recall of Judges, are caprice of the public, immaterial and extraneous issues, politics, personal revenge, and deliberate misrepresentation. One Oregon writer, referring to the position of a judge in that state, says:

> It is unjust, it is degrading, it is inimical to his independence, that he should be compelled to defend his acts or politics or decisions with one hand and combat political ambition and personal popularity of candidates who may oppose him with the other.

It is a Destructive Measure

In theory and in practice, therefore, the inevitable effect of the Recall of Judges is to deprive the courts of independence. The judge sitting subject to recall, has the threat constantly hanging over him

that a dissatisfied litigant, whether it be an influential individual or a community comprising perhaps the larger part of the constituent voters of his judicial district, may, at any time, without cause and by an arbitrary and summary proceeding, force him to resign or to subject himself to the humiliation of a recall instituted and carried through without any of the safeguarding elements to insure him even the form of a fair hearing or of a just determination. It drags him from his high position of an independent, judicial expounder of the law, to the position of a mere puppet who must perhaps make his decrees and his judgment false to his reason, to his conscience and to the law in order to avoid the degradation brought about by the recall petition.

What is true in the case of one judge is true in the case of the entire judiciary. The Recall of Judges means a dependent, cringing and vacillating judicial department; the destruction of all its essential functions. It is repugnant to our constitutional form of government.

The Recall of Judicial Decisions

The Recall of Judicial Decisions, whether in the form presented by its leading advocate, or in any other form, is but a short cut to the disastrous results toward which the Recall of Judges more indirectly tends. The advocates of the Judicial Decision Recall cannot consistently repudiate the Recall of Judges for the two measures are based essentially upon the same vicious fallacies. So we are told by them that these two measures of Judicial Recall are not inconsistent, but that generally the Recall of Judicial Decisions would be the more effective in practice, and is generally to be preferred. As to the Recall of Judges, they say, "Why, yes, we are for that in any community or state where there is a real demand for it; otherwise not." This means simply that they are for the Recall of Judges for those who want it and they are against it for those who do not want it. As to the Recall of Judicial Decisions, its leading sponsor declares, with shrewdness and adroit phrase which, as he obviously thinks, cannot be clearly grasped and answered, that he stands for the Recall by a vote of the people of only such Judicial Decisions as (1) are rendered by state supreme courts in declaring state statutes unconstitutional, (2) where the litigation is not one between man and man, but only where it concerns some great economic or

social question involving the general welfare of the whole people or of a large class, and (3) where there is not involved the question of the validity of a statute as repugnant to the federal constitution. As to the class of decisions so specified, he would suspend the enforcement of the decree of the state supreme court, and refer the correctness of that decision to a vote of the people of the state. If sustained by such vote, then the decree shall be enforced, otherwise not.

The very suggestion of these limitations upon the application of this proposition of direct judicial adjudication by the people only emphasizes its inconsistency and repugnancy to the very fundamentals of our constitutional republican form of government. A people of a state, which is only a small portion of the field of our national jurisprudence, may become wrought up on some question which is purely local, or which involves the local application of some measure ostensibly meritorious in its general principles; or a state, as a whole, may become unduly agitated to the point of demanding a measure which is, in essence and in effect, manifestly repugnant to the fundamental principles of our government and to the established rights of person and of property. Obviously it is not wise and it is not safe to leave to the people of such locality alone the power of direct, immediate and final adjudication as to issues of constitutional law, the power by direct vote to set aside constitutional defenses established as the supreme law of the entire land as well as of the locality in question. Thus the very first limitation which is suggested for the application of the Recall of Judicial Decisions is illustrative of its entire fallacy.

But, again, it is indulging in a mere delusion to attempt to confine cases which are to be subject to popular adjudication to those which do not arise between man and man and to those alone which involve questions of general welfare. Any lawyer or judge knows, and any layman ought to know and recognize the fact, that almost without exception the great questions which have come before and which must come before the courts, involving considerations of questions of great national importance or of social welfare of the entire people or of large classes of people, arise and are decided in cases between individuals. Great questions of public interest are not decided in any distinct class of cases instituted for the consideration of those particular questions. They arise unexpectedly, as necessarily incidental but controlling, in proceedings between one

man and another, in which at first the direct and concrete object of the litigation is devoid of public interest. It is impracticable to enforce the distinction suggested between cases which shall be and those which shall not be adjudicable by an appellate court, whether such court be one of judges or be one composed of the voters of a whole state.

Nor can decisions subject to popular adjudication be confined to those invalidating a state statute on grounds other than that it is repugnant to the federal constitution. The provisions of the federal constitution already above outlined comprise, in almost the very words of that instrument, the principal provisions embodied in every state constitution. Almost without exception, wherever a state statute shall be found repugnant to a state constitution, it would at the same time be repugnant to the federal constitution, and the question adjudicated would really be the repugnancy of a state statute to the federal constitution. The adjudication by the people of the locality, therefore, if rendered, could not give assurance as to the law of local rights until the same question should have been passed upon by the federal courts. Neither can the adjudication made by popular vote be binding upon even the state courts in another similar instance; for the state courts are sworn to decide cases in accordance with the requirements of the federal constitution and the vote of the people could not change a principle of fundamental law established by judicial judgment.

Any measure by which there is given to the people of a locality the direct power of adjudication upon a constitutional question means the elimination of constitutional limitations and safeguards established for the security of liberty, of person and of property. In place of methods of careful and deliberate amendment of constitutions, it substitutes the spasmodic, vacillating and inconsistent expressions, made from time to time, of the arbitrary will of a majority temporarily in power. It substitutes for decree of judgment under the law, the spasmodic will or caprice of the mob. I use the word "mob," which in similar instances never refers to the people generally, but to large numbers of the people, and it may be at times a majority, acting under the influence of passion and prejudice, and against their own real interest, as distinguished from the people acting through forms and procedures of law, established with provisions safeguarding against the result of temporary passion and prejudices and operating in such a way and under such conditions

as ultimately shall insure expression of the calm, sober, deliberate judgment of the people as a whole. The term so used is not a denial but an affirmation, under a constitutional democracy, of a sovereignty vested in the people.

It is unnecessary to give instances of the opportunities of the abuse of the power of popular adjudication upon constitutional questions. We may not overlook, however, the instance of Wisconson where, preceding the year 1911, a state-wide agitation had been made by an appeal to the passion and prejudice of the voters, to demand a statute by which a large class of property owners within the state, whose title to their property had been confirmed by repeated adjudications of the state and federal courts, should have their property taken from them by a legislative fiat and, by the same token, established in the state itself for general public use. The movement, denominated in Wisconsin as "progressive," was successful and the Wisconsin legislature of 1911 passed the now notorious water power act, the provisions of which, within a year were each and all, including the spirit and purpose of the act itself, declared unconstitutional by the Wisconsin supreme court, as repugnant to several provisions of not only the state but of the federal constitution. No lawyer or judge, acquainted with the first principles of the law of property rights or of constitutional law, will pretend to criticise that decision. Nevertheless, such was the prejudice which had been aroused throughout the state in favor of the confiscatory statute, there is no doubt that, if the Recall of Judicial Decisions had been there applicable, the people of the state would have voted within the time required for such a vote, and probably would to-day so vote, that the decision of the Wisconsin supreme court should not stand. By such popular adjudication, if it had been made in Wisconsin, the statute in question would have been sustained and would have remained effective until the question could be brought before the federal supreme court in the same or in a similar case; with the result that that which is one day property in possession of its owners would, for a long period become not their property but would be retained in the possession and control of the state; and after the end of a further period, when judicial judgment under the law finally reigns in place of the drastic and arbitrary decrees of popular passion, the same property would again have been returned to its legal owners.

It is futile to claim that the establishment of the Recall of Judicial Decisions would be consistent with the retention of constitutional government, or that its purpose and effect are any other than to eliminate constitutional safeguards. Even in attempting to answer the charge of President Taft that the proposed new system "would result in suspension or application of constitutional guaranty according to popular whim," which would destroy "all possible consistency" in constitutional interpretation, ex-President Roosevelt expressly referred, in his Carnegie Hall speech of March 20, 1912, to the system criticised as one "amending or construing, to that extent, the constitution,"—that is, to the extent of leaving the enforcement of any constitutional provision to popular vote. The supporters of his proposition, including a well-known publisher and editor, frankly assert that the people within the jurisdiction of any constitution, should, as sovereign rulers and as the makers of the constitution itself, have the power at any time by majority vote to amend, that is to "disregard," such constitution, and that the Recall of Judicial Decisions is sufficiently justified because it will have precisely such effect.

The system of a Recall of Judicial Decisions is inconsistent with our system of government. These two conflicting systems can not exist together. As stated by the Honorable Elihu Root in the speech which he delivered as president of the New York State Bar Association on January 19, 1912:

> We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We cannot maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has

produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influence of declared principles of action.

No Justification by Necessity for Recall of Judicial Decisions

The occasion for the suggestion of the Recall of Judicial Decisions, as outlined by its chief advocate, lies in the peculiar fact that in cases where a state statute is claimed to be repugnant to the federal constitution, and its validity is upheld as against such claim, then such decision is directly reviewable by the federal supreme court; whereas, if the decision is against the validity of the statute and in favor of the claim of its repugnancy to the federal constitution, such decision is not so reviewable. This is because of the peculiar provisions of the act of congress by which the appellate powers of the federal supreme court are fixed; and the distinction is undoubtedly made so as to avoid as far as possible an unnecessary increase of the number of cases which would otherwise come before the federal appellate court. For a long time, representative lawyers of the country have considered this discrimination in allowing appeals as unwise; and the American Bar Association and many leading lawyers have been urging upon congress the desirability of changing the judicature act so as to render possible the review by the federal supreme court of all decisions of a highest state court, which determine to be either valid or invalid a state statute on the issue of its repugnancy to the federal constitution. It is for the people through their representatives in congress to say whether the remedy which is thus possible shall be adopted. It would be a logical, efficient and direct remedy for any evils for the cure of which the Recall of Judicial Decisions is urged. Therefore, besides objections to the Recall of Judicial Decisions on the ground of the vice, inexpediency and danger of such a measure, it is further shown to have no justification on the grounds of emergency or necessity, for there is open an easy, direct and constitutional remedy for all the evils which are complained of as a basis for that measure.

The Judicial Recall is Unrepublican

The federal constitution provides (Article IV, Section 4), "The United States shall guarantee to every state in the Union a republican form of government."

It is obvious that the Judicial Recall measure could not apply in any particular state without express provisions for that purpose in the state constitution. So far as state application is concerned, it must first be adopted as part of the state supreme law, as a feature of state government. The federal constitution contemplated a union of states having as their fundamental principles and laws of government only those which are and which should at all times remain essentially republican in form. And this provision of the constitution was adopted to protect, not merely against intrigues by foreign powers, but also against the ambition and intrigues of local agitators. Its purpose was to keep uniform, within specified limits, the local state governments. As pointed out by Madison in the *Federalist*, explaining the purpose and force of this provision:

> But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?
>
> As long, therefore, as the existing republican forms are continued by the states they are guaranteed by the federal constitution.
>
> The only restriction imposed on them is this, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

It is not left, therefore, to the caprice of each state, from time to time to determine whether it shall adopt features of government which are unrepublican or to repudiate entirely the republican form.

As pointed out also by Madison in the quotation of his observation upon the nature of a "pure democracy" above given, a yielding up to the direct vote of the people, as in pure democracy, is to be avoided as repugnant to our republican form of government, a government under which the people act through their representatives or through representative departments, through whose carefully formulated deliberations and judgments, not the expressions of the temporary spasmodic will of the majority, but the deliberate, consistent and logical judgment of the entire sovereign people, refined and corrected by careful study and consideration by individuals or tribunals adapted to that purpose, may be enforced; and that, too, consistently with the existing provisions of the fundamental supreme law as laid down in the constitution. Not only is such representative element an essential feature of our republican form of government, but another and even more indispensable feature is the maintenance

of untrammeled courts of justice presided over by judges, who, during their terms of office, shall be independent, not only of the legislative and executive department, but independent of even the sovereign power of the people.

No state has been admitted having a recall provision in its constitution, and, thanks to the sturdy, judicial and fearless attitude of President Taft, the precedent has been set for the refusal by the national government to recognize either the wisdom or constitutionality of such a state constitutional provision. That some states have been driven or induced to adopt such a constitutional provision is no justification for similar action by other states. No republic of the modern civilized world had ever experienced even the proposition for the Judicial Recall, much less its adoption as a constitutional provision, until, within the past twenty years, its advocacy was started in Oregon, where it was adopted in 1908. Even the republics of Switzerland, the birthplace of modern direct popular government, have not failed to keep their judicial departments free from the effects of popular clamor. It was left to their disciple, Oregon, to adopt the precedent for modern times of this experiment of radicalism. And the experiment has not only failed, but within the four years of its existence, has demonstrated that it is a weak, inefficient, impracticable, vicious measure.

In no case has a state constitutional provision for judicial recall been upheld as not directly repugnant to this federal constitutional provision. There are reasons compelling the conclusion that, when such question shall arise before the federal court, it will not be left undetermined as being a mere political question. Whatever may be the ultimate methods of procedure by which the question shall be determined and the result of such determination enforced, the conclusion is manifest that the Judicial Recall, whether in the form commonly proposed for the Recall of Judges or for that of Judicial Decisions, is unrepublican in its nature, that it involves a return to the tyranny of democracy, as illustrated in the rule of the demos of ancient Athens, and would be more fruitful of dangers and evils than a change which looked directly to the establishment of a monarchy.

A Waning Cause

It is fortunate, perhaps, that local conditions in isolated localities, exciting the people of certain states to a spasmodic disregard

of fundamental principles, have induced sporadic instances of the formal adoption of the Judicial Recall, in the form of the Recall of Judges. Its adoption by Oregon alone was generally regarded as a local and temporary lapse from reason, and it was not until the example was followed by California and particularly by Arizona, that thinking people were awakened to the knowledge of the real dangers threatened by a fallacy once isolated but which subsequently was found spreading most insidiously and with great celerity. During the past twelve months, no subject has received such attention, whether in non-partisan discussions or in political debates. Its injection into politics is to be deprecated for it cannot from its very nature be properly an issue of national politics. So far as its practical scope is concerned, it is purely a question of state policy or state caprice. So far as the nation as a whole is concerned, it is a question of the science of government and of constitutional law. Comparatively few representative leaders and, almost without exception, none who are really schooled in the principles of jurisprudence, law and government, have been found among its advocates. On the contrary, from every bench and bar and associations of lawyers, from the whole membership of a learned profession entitled to authoritative expression of opinion on this question, have come deliberate protests against this greatest of modern fallacies. And not without results. The sturdy, fearless, statesmanlike action of President Taft in vetoing the Arizona statehood bill is bringing more and more comments of approval from even his political opponents. His reasons, as stated in his veto measure of August 15, 1911, and in his consistent opposition to the Judicial Recall since, have had most beneficial effect in demonstrating to the satisfaction of thinking people that the issue involved in the Judicial Recall is not one of politics, but one of a deliberate choice between a constitutional and an unconstitutional government, between a republican or constitutional democracy and a pure democracy unrestrained by safeguarding provisions essential not only to efficiency but also to permanence. The influence of all this opposition upon legislators, and upon the average citizen unskilled in the profession of law, is apparent. In April, 1911, the Minnesota house of representatives adopted the Recall of Judges by a large majority. At the special session in June, 1912, the same house, with its membership unchanged, expressly repudiated the Recall of Judges by an almost

unanimous vote. Its wisdom and practicability are now disputed or at least questioned by a large portion of its former adherents in the State of Oregon. The past year's campaign against this fallacy has been one of education. Hue and cry, sounding phrases and subtle *ad hominem* appeals to the voters as sovereign, however insidious, are met more and more with the spirit of sober reflection and by minds of a people who are now better informed and who are benefiting by the instructions they have received.

Its elimination as even a pretended issue of national politics is now fortunately assured. The personal views of President Taft, are too well known to require quotation; and the party, of which he is the representative head, is now before the people with the express statement in its platform that the Recall of Judges is regarded as "unnecessary and unwise" and declaring that:

> The social and political structure of the United States rests upon the civil liberty of the individual; and for the protection of that liberty the people have wisely, in the national and state constitutions, put definite limitations upon themselves and upon their governmental officers and agencies. To enforce these limitations, to secure the orderly and coherent exercise of governmental powers and to protect the rights of even the humblest and least favored individual are the function of independent courts of justice. The republican party reaffirms its intention to uphold at all times the authority and integrity of the courts, both state and federal, and it will ever insist that their powers to enforce their process and to protect life, liberty and property shall be preserved inviolate. An orderly method is provided under our system of government by which the people may, when they choose, alter or amend the constitutional provisions which underlie that government. Until these constitutional provisions are so altered or amended, in orderly fashion, it is the duty of the courts to see to it that when challenged they are enforced.

The same platform recognizes that the remedies for existing evils properly lie with the legislative departments by means of further constitutional measures of reform in legal procedure and in provisions for the non-partisan selection of judges. In the words of the platform:

> That the courts, both federal and state, may bear the heavy burden laid upon them to the complete satisfaction of public opinion, we favor legislation to prevent long delays and the tedious and costly appeals which have so often amounted to a denial of justice in civil cases and to a failure to protect the public at large in criminal cases.
>
> Since the responsibility of the judiciary is so great, the standards of judicial action must be always and everywhere above suspicion and reproach. While

we regard the Recall of Judges as unnecessary and unwise, we favor such action as may be necessary to simplify the process by which any judge who is found to be derelict in his duty may be removed from office.

The eminent citizen selected as the representative head of the democratic party, Governor Woodrow Wilson, has recently stated his position on the Judicial Recall as follows:

The Recall of Judges is another matter. Judges are not law-makers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of the first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established.

And his party now goes before the people urging, not disregard of law, but law reform through necessary and proper legislative measures. In the words of its platform:

We recognize the urgent need of reform in the administration of civil and criminal law in the United States, and we recommend the enactment of such legislation and the promotion of such measures as will rid the present legal system of the delays, expense and uncertainties incident to the system as now administered.

The fallacy of the recall, as applied to courts or to decisions of courts, is meeting its own inevitable self-defeat through the increased attention, which its advocacy has forced to the nature and functions of our constitutional government and to the real character, futility and dangers of any remedy, under whatever label it may be presented, containing the destructive ingredients of the Judicial Recall.